Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

NO. 79-1199

THE STATE OF TEXAS,
Petitioner

v.

ANN BATTARBEE,
Respondent

RESPONDENT, ANN BATTARBEE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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IN THE

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ANN BATTARBEE,
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RESPONDENT, ANN BATTARBEE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

---

1. THE STATE OF TEXAS IS PROHIBITED BY ITS CONSTITUTION AND LAWS FROM APPEALING A CRIMINAL CASE.

On February 4, 1980, the State of Texas, represented by the District Attorney of Harris County, Texas, filed a Petition for Writ of Certiorari to the 183rd Judicial District Court of Harris County, Texas. Texas constitutional and statutory law prohibits such action. Article 5, Section 26 of the Texas Constitution provides:

> "The State [of Texas] shall have no right of appeal in criminal cases."

Article 44.01, V.A.C.C.P. provides:

> "The State shall have no right of appeal in criminal actions."

In *White v. State,* 543 S.W.2d 366 (Tex. Cr. App. 1976), the Court of Criminal Appeals of the State of Texas held:

> "We do not dispute the validity or binding effect of the Supreme Court's holding in Texas v. White [423 U.S. 67 (1975)]. However, we have concluded that the State of Texas violated the provisions of its own constitution in pursuing the appeal of this case to that court. * * *
>
> * * * A petition for certiorari in the Supreme Court in a case such as the one before us is an appeal of a criminal case; such appeals are expressly forbidden by Article 5, Section 26 of the Texas Constitution and can no longer be allowed.
>
> * * * Accordingly, we hold that the State may not in any manner appeal a criminal case from this court to the Supreme Court of the United States." *White v. State,* 543 S.W.2d at pp. 367 & 369.

The action of the district attorney of Harris County in filing a Petition for Writ of Certiorari herein is a violation of the Constitution, Statutes and case law of the State of Texas. Thus the Petition for Writ of Certiorari should be dismissed.

2. THE TRIAL COURT CORRECTLY HELD THAT RESPONDENT HAD BEEN TWICE PLACED IN JEOPARDY.

On June 14, 1978 the United States Supreme Court rendered opinions in *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1, and *Greene v. Massey,*

437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed. 15. Respondent had not yet been sentenced. The following day, June 15, 1978 the trial court, as yet unaware of Burks and Greene, overruled Defendant's Motion for New Trial. Later that day, however, Respondent obtained leave of court to file an Amended Motion for New Trial in light of Burks and Greene. That Amended Motion for New Trial was overruled.

Respondent timely filed an appellate brief, the major thrust of which was that she had been twice placed in jeopardy: The Texas Court of Criminal Appeals reversed her first conviction for killing her husband, on the basis of insufficient evidence, *Battarbee v. State,* 537 S.W.2d 12 (Tex. Cr. App. 1976). Over her repeated and strenuous "double jeopardy" objections, founded on the Fifth Amendment to the United States Constitution and on Article 1, Section 14 of the Texas Constitution, she was again tried and convicted.

Meanwhile, the Texas Court of Criminal Appeals held that the double jeopardy rule of *Burks v. United States* and *Greene v. Massey* are to be given retroactive application. *Ex Parte Mixon,* 583 S.W.2d 378 (Tex. Cr. App. 1979); *Ex Parte Reynolds,* 588 S.W.2d 900 (Tex. Cr. App. 1979); *Ex Parte Dixon,* 583 S.W.2d 793 (Tex. Cr. App. 1979).

The State filed a brief in the trial court conceding that Respondent's brief was a correct statement of the law. Thereafter, the trial court, pursuant to its authority and duty under Article 40.09, Section 12 of the Code of Criminal Procedure of Texas, set aside Respondent's second conviction and entered a judgment of acquittal. The State made no effort to prevent the trial court from taking such action.

Respondent's second conviction was not final as of the date of the decision in *Burks v. United States* and *Greene v. Massey*. Defendant's original motion for new trial was still pending, and the trial court gave leave to file an amended motion for new trial so as to consider *Burks v. United States* and *Greene v. Massey*. Thus the question of retroactivity of *Burks v. United States* and *Greene v. Massey* should not be pertinent. Nonetheless, the Supreme Court has consistently held that double jeopardy decisions are to be given retrospective application. *Robinson v. Neil,* 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973).

Until 1965 *all* constitutional decisions of the Supreme Court had been given retrospective effect. But in 1965 in *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), the Supreme Court held that with respect to new constitutional interpretations involving criminal rights the Constitution neither prohibits nor requires retrospective effect. The court went on, in *Linkletter*, and in *Desist v. United States,* 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969) and established guide lines for determining which constitutional rules were to be accorded retrospective effect and which prospective effect only. Generally, the *Linkletter* exception, authorizing prospective effect only, deals with those constitutional interpretations bearing on the use of evidence or on a particular mode of trial, i.e. procedural rules. But in *Robinson v. Neil* the Supreme Court held:

> "The prohibition against being placed in double jeopardy is likewise not readily susceptible of analysis under the Linkletter line of cases. Although the court has not handed down a fully recent opinion on retroactivity of *Benton v. Maryland,* it has indicated that it is retroactive without examination of the Linkletter criteria. *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Ashe v. Swenson,* 397 U.S. 436, 437, Note 1, 90 S.Ct. 1189, 1191, 25 L.Ed.2d 469 (1970). These decisions do not directly control the question of whether *Waller* should be given retrospective effect but they bear upon its disposition.
>
> The guarantee of double jeopardy is significantly different from procedural guarantees held in the *Linkletter* line of cases to have prospective effect only. While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that goven the conduct of trial.
>
> * * * We hold, therefore, that our decision in *Waller v. Florida,* is to be accorded full retroactive effect." *Robinson v. Neil,* 93 S.Ct. at 878, 879.

Thus it is clear that the Supreme Court intends for its double jeopardy decisions to be given full retrospective effect. Indeed, in two Federal Circuit Court cases decided since *Robinson v. Neil,* retroactivity is recognized. In *Jackson v. Justices of the Superior Court of Massachusetts,* 549 Fed.2d 215 (CA 1, 1977), the United States Court of Appeals for the First Circuit dismissed on procedural grounds a class action suit which would have enjoined all State proceedings against juveniles who had previously been prosecuted as juveniles. Although at first blush this case seems to hold against retroactive application of *Breed v. Jones,* 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975), which held that the double jeopardy clause was offended by first prosecuting a person as a juvenile, then prosecuting the same person as an

adult based on the same accusation, it is clear that the majority in that court recognized the probable retroactive application of *Breed v. Jones* but simply held that the class action suit by which petitioners sought to enjoin future prosecutions was not the appropriate remedy. The chief judge of the First Circuit, in a dissent, said:

> "I recognize the undesirable consequences of holding *Breed* retroactive, but I think Mr. Justice Rehnquist's opinion for a unanimous court in *Robinson v. Neil* * * * virtually compels the conclusion that *Breed* is retroactive. * * * The court refused to apply the three pronged *Linkletter* desist criteria reasoning that they had no applicability to rules that in practice precent a trial from taking place at all, rather than merely prescribing procedural rules." *Jackson v. Justices of the Superior Court of Massachusetts,* 549 F.2d 215, at p. 22.

In *Holt v. Black,* 550 F.2d 1061 (CA 6, 1977), the Sixth Circuit squarely held that the double jeopardy holding of *Breed v. Jones* must be given retrospective application.

Thus it is clear that *Burks v. United States* and *Greene v. Massey* are to be given retrospective application. Retroactivity is not a question in the instant case, since Defendant's motion for new trial was pending at the time the Supreme Court decided *Burks v. United States* and *Greene v. Massey,* but even if the retroactivity of those cases is deemed significant, it is clear from *Robinson v. Neil* that double jeopardy decisions must be given retroactive application.

The Texas Court of Criminal Appeals had agreed, and at the time the trial court herein set aside the conviction

and entered a judgment of acquittal, the Court of Criminal Appeals had already rendered its decision, based on both State and Federal grounds, that *Burks v. United States* and *Greene v. Massey* are to be given retrospective application. *Ex Parte Dixon,* supra; *Ex Parte Mixon,* supra; *Ex Parte Reynolds,* supra.

The trial court was correct and the Petition for Writ of Certiorari should be denied, or dismissed.

Respectfully submitted,

FOREMAN, DEGUERIN & DEGEURIN

By: Dick DeGuerin

DICK DEGUERIN
Attorneys for Respondent
609 Fannin, Suite 1111
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(713) 224-9321

CERTIFICATE OF SERVICE

I, Dick DeGuerin, hereby certify that a true and correct copy of the foregoing "Respondent Ann Battarbee's Response to Petitioner's Petition for Writ of Certiorari ~~and Motion to Dismiss Petition for Writ of Certiorari~~" has been mailed to the office of the District Attorney of Harris County, Texas, 201 Fannin, Houston, Texas 77002, this ~~21~~1st day of ~~April~~ May, 1980.

Dick DeGuerin

DICK DEGUERIN

APPENDIX A

NO. 271,632

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
183RD JUDICIAL DISTRICT

THE STATE OF TEXAS

vs.

ANN BATTARBEE

MEMORANDA IN SUPPORT OF DEFENDANT'S MOTION FOR NEW TRIAL AND MOTION IN ARREST OF JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

1. On June 14, 1978 the United States Supreme Court rendered opinions in *Burks v. United States,* ____U.S. ____, 23 Criminal Law Reporter 3098; and *Greene v. Massey,* ____U.S.____, 23 Criminal Law Reporter 3102. These cases squarely hold that the Fifth Amendment's double jeopardy clause precludes a second trial once a reviewing court has determined that the evidence introduced at the first trial was insufficient to sustain a guilty verdict, and that this principal is fully applicable to State criminal proceedings. Cf. *Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), which held that the double jeopardy clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment.

2. At the time the Supreme Court decided *Burks v. United States* and *Greene v. Massey,* Defendant's motion

for new trial herein was pending and set for hearing on June 15, 1978. On the morning of June 15, 1978 this court overruled Defendant's motion for new trial, both the court and counsel for defendant being unaware of the previous day's Supreme Court rulings. However, later that same afternoon counsel for defendant learned of *Burks v. United States* and *Greene v. Massey,* and obtained this court's permission to file an amended motion for new trial and motion in arrest of judgment. Thus said amended motion for new trial and motion in arrest of judgment were timely filed, Cf. Article 40.05, V.A.C.C.P.:

> "* * * but for good cause shown the time for filing or amending may be extended by the court * * *".

3. Defendant's original conviction herein was reversed by the Court of Criminal Appeals on the grounds that the evidence was legally insufficient to sustain her conviction. *Battarbee v. State,* 537 S.W.2d 12 (Tex. Cr. App. 1976):

> "* * * the evidence considered in the light most favorable to the finding of guilt by the trial court is insufficient as a matter of law."

Defendant has consistently urged her plea in bar and her special plea contending that the double jeopardy clause of the Fifth Amendment to the United States Constitution, and the double jeopardy clause of Article 1, Section 14, of the Texas Constitution should have prevented her retria herein. Thus *Burks v. United States* and *Greene v. Massey,* as applied to the instant case, requires that Defendant's second conviction be set aside and that her

plea in bar and special plea be sustained and the State prohibited from trying her again.

4. In the instant case the State now contends that *Burks v. United States* and *Greene v. Massey* should not be given retrospective application. However, Defendant's conviction is not yet final, and as of the date of the decision of *Burks v. United States* and *Greene v. Massey* Defendant's original motion for new trial was still pending, thus the question of retroactivity of Burks v. United States and Greene v. Massey is not pertinent. Nonetheless, the Supreme Court has consistently held that double jeopardy decisions are to be given retrospective application. *Robinson v. Neil,* 409 U.S. 505, 93 Sup. Ct. 876, 35 L.Ed.2d 29 (1973).

Until 1965 *all* constitutional decisions of the Supreme Court had been given retrospective effect. But in 1965 in *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), the Supreme Court held that with respect to new constitutional interpretations involving criminal rights the Constitution neither prohibits nor requires retrospective effect. The court went on, in *Linkletter,* and in *Desist v. United States,* 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969) and established guide lines for determining which constitutional rules were to be accorded retrospective effect and which prospective effect only. Generally, the *Linkletter* exception, authorizing prospective effect only, deals with those constitutional interpretations bearing on the use of evidence or on a particular mode of trial, i.e. procedural rules. But in *Robinson v. Neil* the Supreme Court held:

> "The prohibition against being placed in double jeopardy is likewise not readily susceptible of analy-

sis under the Linkletter line of cases. Although the court has not handed down a fully recent opinion on retroactivity of *Benton v. Maryland,* it has indicated that it is retroactive without examination of the Linkletter criteria. *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Ashe v. Swenson,* 397 U.S. 436, 437, Note 1, 90 S.Ct. 1189, 1191, 25 L.Ed.2d 469 (1970). These decisions do not directly control the question of whether *Waller* should be given retrospective effect but they bear upon its disposition.

The guarantee of double jeopardy is significantly different from procedural guarantees held in the *Linkletter* line of cases to have prospective effect only. While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of trial.

> * * * We hold, therefore, that our decision in *Waller v. Florida,* is to be accorded full retroactive effect." *Robinson v. Neil,* 93 S.Ct. at 878, 879.

Thus it is clear that the Supreme Court intends for its double jeopardy decisions to be given full retrospective effect. Indeed, in two Federal Circuit Court cases decided since *Robinson v. Neil,* retroactivity is recognized. In *Jackson v. Justices of the Superior Court of Massachusetts,* 549 Fed.2d 215 (CA 1, 1977), the United States Court of Appeals for the First Circuit dismissed on procedural grounds a class action suit which would have enjoined all State proceedings against juveniles who had previously been prosecuted as juveniles. Although at first blush this case seems to hold against retroactive application of *Breed v. Jones,* 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed. 2d 346 (1975), which held that the double jeopardy

clause was offended by first prosecuting a person as a juvenile, then prosecuting the same person as an adult based on the same accusation, it is clear that the majority in that court recognized the probable retroactive application of *Breed v. Jones* but simply held that the class action suit by which petitioners sought to enjoin future prosecutions was not the appropriate remedy. The chief judge of the First Circuit, in a dissent, said:

> "I recognize the undesirable consequences of holding *Breed* retroactive, but I think Mr. Justice Rehnquist's opinion for a unanimous court in *Robinson v. Neil* * * * virtually compels the conclusion that *Breed* is retroactive. * * * The court refused to apply the three pronged *Linkletter desist* criteria reasoning that they had no applicability to rules that in practice prevent a trial from taking place at all, rather than merely prescribing procedural rules." *Jackson v. Justices of the Superior Court of Massachusetts,* 549 Fed.2d 215, at p. 221.

In *Holt v. Black,* 550 Fed.2d 1061 (CA 6, 1977), the Sixth Circuit squarely held that the double jeopardy holding of *Breed v. Jones* must be given retrospective application.

Thus it is clear that *Burks v. United States* and *Greene v. Massey* are to be given retrospective application. Retroactivity is not a question in the instant case, since Defendant's motion for new trial was pending at the time the Supreme Court decided *Burks v. United States* and *Greene v. Massey,* but even if the retroactivity of those cases is deemed significant, it is clear from *Robinson v.*

Neil that double jeopardy decision must be given retroactive application.

Respectfully submitted,

FOREMAN & DEGUERIN

By: _____

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CERTIFICATE OF SERVICE

I, Dick DeGuerin, hereby certify that a true and correct copy of the foregoing "Memoranda in Support of Defendant's Motion for New Trial and Motion in Arrest of Judgment" has been furnished to the office of the District Attorney of Harris County, Texas this 3rd day of July, 1978.

_____

DICK DEGUERIN

APPENDIX B

NO. 78,1084

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS
AUSTIN, TEXAS

ANN BATTARBEE

vs.

THE STATE OF TEXAS

APPELLANT'S BRIEF ON APPEAL

Appeal From Cause No. 271,632 in the
183rd Judicial District Court of
Harris County, Texas

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806 Main, Suite 512
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(Omitted)

TABLE OF CITATIONS
(Omitted)

GROUNDS OF ERROR

GROUND OF ERROR NUMBER ONE

DEFENDANT'S SECOND TRIAL FOR KILLING HER HUSBAND OFFENDS THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES AND TEXAS CONSTITUTIONS.

GROUND OF ERROR NUMBER TWO

THE INDICTMENT IS DEFECTIVE AND DEFENDANT'S MOTION TO QUASH THE INDICTMENT SHOULD HAVE BEEN GRANTED.

STATEMENT OF THE NATURE OF THE CASE

In 1973 Defendant was charged by indictment with the offense of murder with malice aforethought in connection with the death of her husband, Vernon Battarbee. This indictment bears Cause No. 194,899 and is found as an exhibit to the hearing on Defendant's Plea in Bar, beginning on page 177 of the Record on Appeal. Defendant was convicted of this offense but on appeal her conviction was reversed because of insufficient evidence. *Battarbee v. State,* No. 50980, 537 S.W.2d 12 (Tex. Crim. App. 1976), the Court, per Judge Douglas, saying:

> "* * * the evidence considered in the light most favorable to the finding of guilt by the trial court is insufficient as a matter of law." Battarbee v. State, 537 S.W.2d at p. 16.

Pursuant to the then existing Texas law, the case was remanded to the trial court. There after several sunperceding indictments were returned, the last of which resulted in the instant conviction for killing Vernon Battarbee "with malice aforethought" by "failing, refusing and omitting to provide support, care, medical attention, proper medical treatment and hospitalization". Defendant's Plea in Bar on Double Jeopardy grounds (R. 15) was denied, as was Defendant's Motion to Quash Indictment (R. 9). After her conviction, on June 15, 1978, Defendant obtained leave of court to file her Amended Motion for New Trial (R. 3286) and Motion in Arrest of Judgment (R. 3284), based on Double Jeopardy grounds as announced the previous day by the United States Supreme Court in *Burks v. U. S.*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (June 14, 1978) and *Greene v. Massey,* 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (June 14, 1978). The trial court overruled both motions and Defendant gave notice of appeal. All appellate prerequisites have been met.

STATEMENT OF FACTS

Although the trial was lengthy and complex, the Record encompassing eight fat volumes, the Grounds of Error are simple and concise and there is no need to relate the facts here. All that matters is that Defendant's earlier conviction for killing her husband was reversed for insufficient evidence and that, over her timely and persistent invocation of her Double Jeopardy rights, she was again tried and convicted for killing her husband.

ARGUMENT AND AUTHORITIES

GROUND OF ERROR NO. ONE RESTATED

DEFENDANT'S SECOND TRIAL FOR KILLING HER HUSBAND OFFENDS THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES AND TEXAS CONSTITUTIONS.

ARGUMENT UNDER GROUND OF ERROR NUMBER ONE

The United States Supreme Court has now held that a second trial is prohibited once a reviewing court has determined that there was insufficient evidence to support the verdict. *Burks v. U. S.*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Greene v. Massey,* 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1979). In *Battarbee v. State,* No. 50980, 537 S.W.2d 12 (Tex. Crim. App. 1976), this court held that Defendant's conviction for killing her husband must be reversed for insufficient evidence to support the verdict:

> "* * * the evidence considered in the light most favorable to the finding of guilt by the trial court is insufficient as a matter of law". *Battarbee v. State,* 537 S.W.2d at p. 16.

Defendant was then put to trial again on an accusation that she killed her husband. She persistently objected to the second trial on the basis of her protection against "double jeopardy" as guaranteed by the Fifth Amendment to the United States Constitution and Article I, Section 14 of the Texas Constitution, but she was again convicted.

The Court of Criminal Appeals has held that the Double Peopardy rule of *Burks v. U. S.* and *Greene v. Massey,* supra, are to be given retroactive application. *Ex Parte Mixon,* 583 S.W.2d 378 (Tex. Crim. App. 1979); *Ex Parte Reynolds,* 588 S.W.2d 900 (No. 60647, Tex. Crim. App. 1979); *Ex Parte Dixon,* 583 S.W.2d 793 (Tex. Crim. App. 1979). Even so, *Burks v. U. S.* and *Greene v. Massey* were decided on June 14, 1978, *before* the trial

court here had ruled on Defendant's Motion for New Trial and Motion in Arrest of Judgment. Defendant should not have been tried again and her conviction should be set aside and a judgment of acquittal entered.

GROUND OF ERROR NUMBER TWO RESTATED

THE INDICTMENT IS DEFECTIVE AND DEFENDANT'S MOTION TO QUASH THE INDICTMENT SHOULD HAVE BEEN GRANTED.

ARGUMENT UNDER GROUND OF ERROR NUMBER TWO

The indictment alleged:

> "Ann Battarbee * * * as the wife of Vernon Battarbee * * * did have a statutory duty to support [Vernon Battarbee], *by providing medical attention* to [Vernon Battarbee] * * * [and she] did kill [Vernon Battarbee] by * * * failing, refusing and omitting to provide support, care, medical attention, proper medical treatment and hospitalization for [him] * * *."

Defendant moved to quash the indictment on the basis that the indictment alleged a duty not owed under Texas law, that of "providing medical attention" and that the omission charged, i.e. failure to provide care, proper medical treatment and hospitalization, was not within the duty owed. The trial court denied the Motion to Quash.

The only duty owed by one spouse to the other, in Texas, is the duty of support outlined in Section 4.02 of the Texas Family Code:

> "Each spouse has the duty to support his or her minor children. The husband has the duty to support

> the wife, and the wife has the duty to support the husband when he is unable to support himself * * *".

The duty of support owed by a parent to a child is further defined in Section 12.04, Texas Family Code, as

> "the duty to support the child, including providing the child with clothing, food, shelter, medical care and education * * *".

However, there is no further definition in the Family Code of the duty of support one spouse owes another. The indictment pled a duty not owed and Defendant's Motion to Quash the indictment should have been granted.

CONCLUSION AND PRAYER

For the reason stated, the conviction should be reversed and a judgment of acquittal should be entered.

Respectfully submitted,

FOREMAN & DEGUERIN

By: _____

Dick DeGuerin
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(713) 224-9321

CERTIFICATE OF SERVICE

I, Dick DeGuerin, hereby certify that a true and correct copy of the foregoing "Appellant's Brief" has been furnished to the office of the District Attorney of Harris County, Texas, 301 San Jacinto, Houston, Texas, this 27th day of September, 1979.

_____

Dick DeGuerin

APPENDIX C

NO. 271,632

IN THE 183RD DISTRICT COURT
OF HARRIS COUNTY, TEXAS

---

and

NO._____

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS, IN AUSTIN

ANN BATTARBEE
Appellant

v.

THE STATE OF TEXAS
Appellee

STATE'S APPELLATE BRIEF

JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas

JAMES C. BROUGH
Assistant District Attorney
Harris County, Texas

JACK BODIFORD
Assistant District Attorney
Harris County, Texas

RUSSELL HARDIN
Assistant District Attorney
Harris County, Texas

Counsel for Appellee

TO THE RESPECTIVE COURTS:

OFFENSE: Murder

PENALTY: 10 Years, Probated

Immediately following the docket sheet in Appellant's Exhibit 1 in her plea in bar, which begins at R. 177, is a copy of the indictment in Cause No. 194,899, State of Texas v. Ann Battarbee.

On this indictment Appellant was convicted of murder. On appeal that conviction was reversed for insufficient evidence and remanded, *Battarbee v. State,* 537 S.W.2d 12.

Subsequently Appellant was re-indicted in this cause (R. 5), this indictment alleging, in the first paragraph, murder by act, and, in the second paragraph, murder by omission.

The jury was charged only on murder by omission (R. 39 *et seq.*). The verdict of guilty was returned by this jury (R. 52, R. 60) and, on Appellant's timely election, the court assessed punishment at ten years confinement, but suspended imposition of sentence and placed Appellant on probation (R. 60-61). Appellant gave notice of appeal, and is free on original bond pending appeal (R. 61).

In her brief filed with the clerk of the trial court, Appellant claims prior jeopardy.

This claim was made at trial, in Appellant's plea in bar (R. 15-25), heard October 7, 1977 (R. 111).

At that time, the law of Texas required that a case reversed for insufficient evidence be remanded for new

trial, and this had been done (R. 25). Article 44.24(b) C.C.P. limited the power of the Court of Criminal Appeals of Texas to the power to affirm, reverse and remand for new trial, reverse and dismiss, or reform and correct the judgment.

Article 44.25 C.C.P. specifically ordered that a cause reversed because the verdict is contrary to the evidence shall be remanded for new trial.

This Court properly denied Appellant's plea in bar on October 21, 1977 (R. 126-27).

On June 14, 1978, the United States Supreme Court handed down its opinion in *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1, and *Greene v. Massey,* 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15.

The *Burks* case changed the federal law on jeopardy. Previously, if a federal case was reversed for insufficiency of evidence, the appellate court had the power and duty, under 28 U.S.C.A., 2106, to order acquittal, unless—as is true in the case at bar—the appellant had filed his motion for new trial, in which case he received the new trial he had sought. *Greene, supra,* applied *Burks* to a Florida state court case.

On June 15, 1978, Appellant obtained leave of court to file her Amended Motion for New Trial (R. 3286), and Motion in Arrest of Judgment (R. 3284), claiming prior jeopardy under the *Burks* and *Greene* cases. These motions were argued before the court July 5, 1978, first the defense (R. 3183) and then the State (R. 3196), and then the defense again (R. 3204).

The main point of contention was whether or not the new rule of *Burks v. United States, supra,* and *Greene*

v. Massey, supra, which expanded jurisdiction of the Texas Court of Criminal Appeals, should apply retroactively to Texas cases.

The argument made by the Appellant was substantially that later set forth in Judge Odom's majority opinion, en banc, in *Ex Parte Edith Reynolds,* Cause No. 60,647, opinion of June 20, 1979. The State, in substance, argued, and presented in its memorandum opposing these motions (R. 74), the view and authorities later set forth in the dissenting opinion in *Ex Parte Reynolds, supra* by Judge Douglas, with Judge W. C. Davis concurring.

The court in the instant case recessed the hearing until July 7, 1978 (R. 3208), and then until August 3, 1978 (R. 103), when it reconvened (R. 103, R. 3210), heard further similar argument from the defense, and then denied the defense motions which rested on the claim of former jeopardy (R. 3218).

The court stated (R. 3218):

> I feel, in the opinion of the court, there is certainly an issue of law that is to be determined.

At that time, no decision had been made by the Texas Court of Criminal Appeals on the retroactivity of *Burks v. United States, supra,* and *Greene v. Massey, supra.* Subsequently, on February 28, 1979, in *Ex Parte Mixon,* 583 S.W.2d 378, *Burks* and *Greene* were held, rather briefly, to be retroactive. A State's Motion for Leave to File Motion for Rehearing was filed in *Mixon.*

On June 20, 1979, *Ex Parte Reynolds* was decided with a rather extended opinion by Judge Odom, holding *Burks* and *Greene* to be retroactive, and with Judge Douglas' strong dissenting opinion.

On July 18, 1979, the State's Motion for Leave to File its Motion for Rehearing in the *Mixon* case was denied. Judge Douglas dissented for the reasons stated in his *Reynolds* dissent.

On September 19, 1979, the State's Motion for Leave to File Motion for Rehearing in the *Reynolds* case was denied, making that decision final.

On July 18, 1979, the same day the final ruling was made in *Ex Parte Mixon, supra,* an en banc decision was handed down in *Ex Parte Dixon*, 583 S.W.2d 793. Judge Douglas, who the same day recorded his dissent as to *Mixon,* wrote the opinion.

Noting that the Court of Criminal Appeals had held *Burks* and *Greene* to be retroactive, he applied this holding, granting relief to *Dixon.*

The United States Supreme Court has not yet decided whether *Burks v. United States, supra,* and *Greene v. Massey, supra,* are retroactive or merely prospective. The writer of this brief believes that the position taken by Judge Douglas in his dissenting opinion in *Ex Parte Reynolds, supra,* is sound, and may be the position eventually taken by the United States Supreme Court, but, at present, knows of no authority to urge in support of this position which has not been obviously considered by the Texas Court of Criminal Appeals.

This highest Texas court in criminal case jurisdiction has now clearly and repeatedly held *Burks* and *Greene* to be retroactive.

By a five to four decision in *Roger Dale Porier,* opinion of October 3, 1979, the majority opinion by Judge Douglas held *Burks* and *Greene* do not apply when enhance-

ment allegations are not adequately proved. The dissenting opinion by Judge Odom stated, inter alia:

> Retrial of the issue . . . denies appellant due course of law under Art. I, § 19 of the Texas Constitution.

Such a newly found holding in a majority opinion, would preclude a review on certiorari by the United States Supreme Court.

CONCLUSION

In summary, at this time the law on the issue of Appellant's claim of former jeopardy, as decided in Texas, clearly supports Appellant's position.

Nevertheless, because the writer of this brief believes the dissenting opinion in *Ex Parte Reynolds, supra,* is the sounder position and should eventually prevail, the State contends that the conviction in the case at bar should be affirmed.

Respectfully submitted,

/s/ JAMES C. BROUGH
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been mailed to the following address:

/s/ JAMES C. BROUGH
James C. Brough
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Harris County, Texas
201 Fannin
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Date: Oct. 18, 1979
gsb